Supreme Court, U.S.
FILED

JAN 13 2011

OFFICE OF THE CLERK

No. 10-967

IN THE

Supreme Court of the United States

TERRY ADEDIRAN,

Petitioner,

v.

U.S. ATTORNEY GENERAL

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Board of Immigration Appeals' decision to deny cancellation of removal of certain non-lawful permanent residents based upon a lack of showing the requisite 'exceptional and extremely unusual hardship' to U.S. Citizen children should properly be insulated from any judicial review at all when the Board itself has issued the only binding precedents regarding what level of prospective hardship reaches the threshold of showing of 'exceptional and extremely unusual hardship' to Petitioner's U.S. Citizen minor children if Petitioner is deported.

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OPINIONS BELOW

The Immigration Judge below denied all relief from deportation and entered an order of removal on August 26, 2008. *D.H.S. vs. Terry Iyabo Adediran*, File No. A070 904 503. The Board of Immigration Appeals dismissed the appeal on January 29, 2010. *D.H.S. vs. Terry Iyabo Adediran*, File No. A070 904 503. (unpublished decision). The Eleventh Circuit Court of Appeals dismissed the petition in part, and denied the petition in part on October 15, 2010. *Terry Adediran v. U.S. Attorney General*, Case No. 10-10827 (unpublished decision).

STATEMENT OF JURISDICTION

Jurisdiction of the U.S. Court of Appeals to review a removal order is established by 28 U.S.C. Section 1252. The Eleventh Circuit Court of Appeals dismissed the petition for review in part and denied it in part on October 15, 2010.

The Supreme Court has jurisdiction to entertain cert petitions. 28 U.S.C. Section 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article I, Section 9, clause 2: The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

8 U.S.C. Section 1229(b)(1)(D)(i) further provides that no court has jurisdiction regarding the granting of

relief under section . . . 1229b . . . of this title. 8 U.S.C. Section 1229(b)(1)(D)(ii) further provides that no court shall have jurisdiction to review any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this chapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under Section 1158(a) of this title. The REAL ID Act, Pub. L. 109-13, Div. B, 119 Stat. 302 (2005) restored jurisdiction to consider Constitution claims or questions of law. 8 U.S.C. Section 1252(a)(D)(2005).

8 CFR Section 1003.1(g)(2003): Decisions as precedents. Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States.

STATEMENT OF THE CASE

Respondent is a native and citizen of Nigeria who overstayed her authorized period of admission to the U.S. She is a nurse by profession, and is a single mother who has two U.S. Citizen children who were ages 10 and 14 at the time her application to cancel her removal was denied by the Immigration Judge below on August 26, 2009. She timely appealed the denial to the Board of Immigration Appeals. (She also applied for, and was denied asylum, deferral of removal, protection under the Convention Against Torture, and voluntary departure

from the U.S. but review of these decisions is not sought in this Court). The Board of Immigration Appeals dismissed the appeal on January 29, 2010. She timely appealed to the U.S. Court of Appeals to the Eleventh Circuit. The Eleventh Circuit Court of Appeals dismissed the petition in part, and denied the petition in part on October 15, 2010. Petitioner timely seeks a writ of certiorari to this Court on the sole issue of whether or not the Court of Appeals has any jurisdiction to review the question of whether the prospective hardship to her U.S. Citizen daughters amounts to 'exceptional and extremely unusual' so as to qualify her as a threshold matter for the relief from removal of cancellation of removal for certain non-lawful permanent residents under 8 U.S.C. Section 1229b(b)(1)(D)(2005).

Basis for jurisdiction of the federal court of appeals in the first instance: Jurisdiction of the U.S. Court of Appeals to review a removal order is governed by 28 U.S.C. Section 1252 (2005).

REASONS FOR GRANTING THE PETITION

The decision of the Eleventh Circuit Court of Appeals finding no jurisdiction to review any determination regarding whether or not Petitioner can show 'exceptional and extremely unusual hardship' to her two U.S. Citizen children conflicts with the Third Circuit's approach. *Pareja v. Attorney General of the United States*, 615 F.3d 180 (3 CA 2010) found jurisdiction to entertain challenges to certain questions of law in a petition to review the denial of cancellation of removal for certain non-lawful permanent residents.

The U.S. Department of Justice, i.e. the Executive Branch's delegatee in removal proceedings, has, as a practical matter, provided the country with the sole definition of what constitutes 'exceptional and extremely unusual hardship' to qualifying relatives in cancellation of removal applications for certain non-lawful permanent residents under 8 U.S.C. Section 1229b(b)(1)(D). The agency has created its own standards by publishing three "precedent decisions," or case law standards, *Matter of Monreal*, 23 I. & N. Dec. 56 (BIA 2001), *Matter of Andazola*, 23 I. & N. Dec. 319 (BIA 2002), and *Matter of Recinas*, 23 I. & N. Dec. 467 (BIA 2002) under its delegated authority from the U.S. Attorney General pursuant to 8 CFR Section 1003.1(g)(2003). This regulation allows the Board of Immigration Appeals to issue precedent decisions which are binding precedent on all officers and employees of the Department of Homeland Security and Immigration Judges. As a practical matter, the Board of Immigration Appeals has creating the sole precedents for the determination of what constitutes 'exceptional and extremely unusual hardship' in all cancellation of removal for certain non-lawful permanent resident cases since the Federal Courts have been uniformly unwilling to second guess the agency's interpretation of 'exceptional and extremely unusual hardship' to qualifying U.S. Citizen and legal permanent residents under the *Chevron* doctrine of deference. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed. 2d 694 (1984).

Petitioner's specific complaint with the finding of a lack of jurisdiction in this case is that the U.S. Court of Appeals for the Eleventh Circuit dismissed out of hand

its jurisdiction to review, under any standard of review, the application of the 'exceptional and extremely unusual hardship' standard to undisputed facts regarding the consequence of Petitioner's deportation which her two U.S. Citizen children will suffer if their mother is deported to Nigeria. *Adediran v. U.S. Attorney General*, ___F. 3d____, Case No. 10-10827 (unpublished opinion) at 4. The Eleventh Circuit found a lack of jurisdiction by labeling its decision as "purely discretionary." Petitioner counters that this decision is not discretionary because it is the application of a bright line case law test to undisputed facts. See *Bernabe-Reyes v. U.S. Attorney General*, 361 Fed. Appx. 401 (3CA 2010). By contrast, Petitioner concedes that the ultimate decision to grant or deny relief once eligibility is established is what is "purely discretionary." The Board itself created the case law rule which it then applied to a set of undisputed facts. The determination of whether or not the prospective hardship to Petitioner's two U.S. children amounts to 'exceptional and extremely unusual hardship' under 8 U.S.C. Section 1229b(b)(1)(4) is a question of law. The Court's finding of a lack of jurisdiction is contrary to the review granted to the Federal Courts by the REAL ID Act, Pub. L. 109-13, Div. B, 119 Stat. 302 (2005) which authorizes judicial review of questions of law and Constitutional questions, adding 8 U.S.C. Section 1252(a)(2)(D)(2005).

Congress established a ceiling of the number of aliens who could be granted cancellation of removal for certain non-lawful permanent residents under 1229b(b)(1997) when it created this form of relief from deportation. See 8 U.S.C. Section 1229b(e)(1)(1997). To the best of Petitioner's knowledge, this cap of 4,000

grants of relief under cancellation of removal for certain non-lawful permanent residents, and its precursor "suspension of deportation" has never been reached in more than 13 years. This under utilization of permissible grants of discretionary relief must be due either to the Board of Immigration Appeal's overly restrictive case law rules which are not challenged herein, or to the Board's stringent application of its own case law jurisprudence to cases before it.

Petitioner notes that this Court has recently reaffirmed that there is a presumption favoring judicial review of administrative action. *Kucana v. Holder*, ____U.S. ____, 130 S. Ct. 827, 830 175 L. Ed. 2d 694 (2010).

To not recognize any judicial review of an agency's application of a case law set of rules which the agency itself developed unilaterally to undisputed facts is akin to permitting "the fox to guard the chicken coop." The Board of Immigration Appeals has unbridled and unchecked power over deciding who qualifies for cancellation of removal for certain non-lawful permanent residents based upon its own application of its own hardship standard, unless judicial review is established.

The lack of judicial review found by the Eleventh Circuit Court of Appeals raises a serious question implicating the Suspension clause, U.S. Const. art I, Section 9, cl. 2. The petition for review which was filed by Petitioner is the equivalent remedy to the privilege of the writ of habeas corpus. See *Negrete v. Napolitano*, 567 F.3d. 419 (CA9 2009). In this case, the lower Court's denial of any judicial remedy to the Attorney General's

denial amounts to suspension of the privilege of the Writ of Habeas Corpus because it leaves Petitioner with no remedy to challenge her denial and the resulting restraint of her liberty based upon the Executive's interpretation of the statute. The Attorney General's delegatee the Board of Immigration Appeals alone has created the standards for interpreting this hardship standard. Congress expressly granted review authority to the various courts of appeals of questions of law in removal proceedings. That scope of review of the statute must include review of the application of the Attorney General's own administrative judge - made standard for showing the requisite 'exceptional and extremely unusual hardship' standard to Petitioner's qualifying U.S. Citizen and lawful permanent resident relatives in order that the Suspension clause not be implicated. This important and relatively straightforward question of the application of a legal standard to undisputed facts is a question of law. It is not discretionary authority exercised by the Board of Immigration Appeals, despite the label it has been given by the U.S. Court of Appeals for the Eleventh Circuit, and other circuits[1], with the partial exception of the Third Circuit.

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1. See, for example, *Santana – Median v. Holder*, 616 F.3d 49 (CA1 2010); *De La Vega v Gonzales*, 436 F. 3d 141 (CA2 2006); *Romero Torres v. Ashcroft*, 337 F.3d 887 (CA9 2003); *Martinez v U S. Attorney General*, 446 F.3d 1219, 1221-1222 (CA11 2006).

CONCLUSION

In conclusion, this case is sufficiently important under Rule 10(a) of this Court for the petition for writ of certiorari to be granted.

Respectfully submitted,

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